LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 19 1968
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 9

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,

Appellant,

—v.—

VIVIAN THOMPSON,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 33

WALTER E. WASHINGTON, *et al.*,

Appellants,

—v.—

CLAY MAE LEGRANT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 34

ROGER A. REYNOLDS, *et al.*,

Appellants,

—v.—

JUANITA SMITH, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL BRIEF FOR APPELLEES ON REARGUMENT

ARCHIBALD COX
Langdell Hall
Cambridge, Massachusetts 02138

HOWARD LESNICK
3400 Chestnut Street
Philadelphia, Pa. 19104

Attorneys for Appellees in Nos. 9, 33, and 34

BRIAN L. HOLLANDER
One Constitution Plaza
Hartford, Connecticut 06103
Attorney for Appellee in No. 9

PETER S. SMITH
416 5th Street, N.W.
Washington, D.C. 20001
Attorney for Appellees in No. 33

THOMAS K. GILHOOL
313 South Juniper Street
Philadelphia, Pennsylvania 19107
Attorney for Appellees in No. 34

INDEX

SUBJECT INDEX

	Page
Summary of Argument	3
ARGUMENT:	
I. The one-year-residence requirement violates the Equal Protection and Due Process Clauses by discriminating, without justification, between persons identically situated in relation to fundamental human needs, solely because of the exercise of liberty of geographic migration	7
A. The one-year-residence requirement works gross discrimination, in relation to the very essentials of life, among persons whose situation is otherwise identical	7
B. The one-year-residence requirement discriminates among persons whose situation is otherwise identical solely on the basis of the exercise of a constitutionally protected liberty	15
C. The one-year-residence requirement bears no substantial relation to any permissible State objective	20
1. To discourage the poor from entering the jurisdiction	22
2. Investment in the community	24
3. To deter immigration by persons seeking more liberal assistance	26
4. To provide an objective test of residence	32
5. To prevent the fraudulent receipt of benefits from two States	36

Page

6. Facilitation of Budgeting 36

7. Protection of the fisc 37

D. A classification which, without justification, penalizes those who exercise constitutional liberties by discriminating in the provision of public assistance violates the Equal Protection and Due Process Clauses 38

II. Section 402(b) of the Social Security Act is not controlling 39

A. Section 402(b) gives no congressional sanction to one-year-residence requirement for public assistance 39

B. Section 402(b), even if read to authorize one-year-residence requirements, would not control the constitutional issue 45

Conclusion 47

Table of Authorities

CASES:

Aptheker v. *Secretary of State*, 378 U.S. 500 32
Arizona v. *Ewing*, Civ. No. 2008-52 (D.D.C.) 43
Arizona v. *Hobby*, 221 F.2d 498 (D.C. Cir.) 43
Asbury Hospital v. *Cass County*, 326 U.S. 207 14

Baldwin v. *Seelig*, 294 U.S. 511 27
Bates v. *Little Rock*, 361 U.S. 516 21
Bolling v. *Sharpe*, 347 U.S. 497 39
Burton v. *Wilmington Parking Authority*, 365 U.S. 715 44

Carrington v. *Rash*, 380 U.S. 89 .....12, 14, 20, 21, 35
Commonwealth of Pennsylvania v. *Board of Directors of City Trusts*, 353 U.S. 230 14

Page

Corfield v. *Coryell*, 4 Wash. C.C. 371 (Cir. Ct. E.D. Pa.) 16
Crandall v. *Nevada*, 6 Wall. 35 ..... 17, 19

Edwards v. *California*, 314 U.S. 160 ..... 17, 19, 23, 24, 26
Evans v. *Newton*, 382 U.S. 296 14

Green v. *Department of Public Welfare*, 270 F. Supp. 173 (D. Del.) 13
Griswold v. *Connecticut*, 381 U.S. 479 21
Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U.S. 150 14

Harmon v. *Forssenius*, 380 U.S. 528 35
Harper v. *Board of Elections*, 383 U.S. 663 21

Johnson v. *Robinson*, —— F. Supp. —— (N.D. Ill.) 14

Katzenbach v. *Morgan*, 384 U.S. 641 ..... 44, 45

Levy v. *Louisiana*, 391 U.S. 68 21
Loving v. *Virginia*, 388 U.S. 1 20

McLaughlin v. *Florida*, 379 U.S. 184 ..... 14, 20

NAACP v. *Alabama*, 377 U.S. 288 32

Plessy v. *Ferguson*, 163 U.S. 537 44
Poe v. *Ullman*, 367 U.S. 497 19

Ramos v. *Health and Social Services Board*, —— F. Supp. —— (E.D. Wisc.) 14
Reitman v. *Mulkey*, 387 U.S. 369 16
Rinaldi v. *Yeager*, 384 U.S. 305 21
Robertson v. *Ott*, —— F. Supp. —— (D. Mass.) 13

Schneider v. *Rusk*, 377 U.S. 163 39
Shelton v. *Tucker*, 364 U.S. 479 32
Sherbert v. *Verner*, 374 U.S. 398 ..... 14, 36, 38, 39
Simkins v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959, cert. denied, 376 U.S. 938 ..... 14, 42
Skinner v. *Oklahoma*, 316 U.S. 535 21

Page

Slaughterhouse Cases, 16 Wall. 36 17
South Carolina State Highway Department v. *Barnwell Brothers*, 303 U.S. 177 21
Speiser v. *Randall*, 357 U.S. 513 38
Tot v. *United States*, 319 U.S. 463 33
Truax v. *Raich*, 239 U.S. 33 24
Twining v. *New Jersey*, 211 U.S. 78 17
United States v. *Carolene Products Co.*, 304 U.S. 144 21
United States v. *Guest*, 383 U.S. 745 ..... 17, 19, 24

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution
Article IV, Section 2 16
Fifth Amendment 3, 4, 5, 8, 19, 24, 39, 43
Fourteenth Amendment 3, 8, 17, 19, 39

United States Code
42 U.S.C. 302(b) 39
42 U.S.C. 601 13
Section 402 of the Social Security Act (42 U.S.C. 602) 24, 40, 41, 43, 44, 47
Section 402(a) of the Social Security Act (42 U.S.C. 602(a)) 42, 44
Section 402(b) of the Social Security Act (42 U.S.C. 602(b)) 5, 6, 39, 40, 43, 45, 46
42 U.S.C. 604(b) 43
42 U.S.C. 1202(b) 39
42 U.S.C. 1352(b) 39
42 U.S.C. 1382(b) 39

Connecticut General Statutes
§17-2d 7

District of Columbia Code
§3-203 ..... 7, 47
§3-203(a) 6

Page

Pennsylvania Statutes Annotated
Title 62, §401 ..... 7, 13
Title 62, §432(6) 7

REGULATIONS:

Department of Health, Education and Welfare, Handbook of Public Assistance Administration
Part IV, Section 3620 32
Part IV, Section 3651 32
Pennsylvania Public Assistance Manual
Section 3151.11 32

MISCELLANEOUS:

Articles of Confederation
Article IV 16
Chafee, *Three Human Rights in the Constitution of 1787* (1956) 19, 24
H. Rep. No. 615, 74th Cong., 1st Sess., 24 (1935) 41
79th Cong. Rec. 5470 (1935) 41
79th Cong. Rec. 5602 (1935) 41
79th Cong. Rec. 9268 (1935) 42
79th Cong. Rec. 9285 (1935) 42
Note, 76 *Yale L. J.* 1222 (1967) 43
Pennsylvania Department of Public Welfare, *Public Assistance Allowances Compared With the Cost of Living at a Minimum Standard of Health and Decency* (1967) 9
Reich, *The New Property*, 73 YALE L. J. 733 (1964) 15
Report of the Advisory Council on Public Welfare, *Having the Power, We Have the Duty* (1966) 9
S. Rep. No. 627, 74th Cong., 1st Sess. 35 (1935) .. 41
Social Security Board, *Social Security in America* (1937) 41

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 9

BERNARD SHAPIRO,
Welfare Commissioner of Connecticut,

Appellant,

—v.—

VIVIAN THOMPSON,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 33

WALTER E. WASHINGTON, *et al.*,

Appellants,

—v.—

CLAY MAE LEGRANT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 34

ROGER A. REYNOLDS, *et al.*,

Appellants,

—v.—

JUANITA SMITH, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL BRIEF FOR APPELLEES ON REARGUMENT

The facts are stated and the several questions of law fully argued in the separate briefs already filed by the Appellees in each of these three cases. We reaffirm those arguments without qualification. We should also remind the Court of the issues peculiar to individual cases, which are covered in the separate briefs, such as the claim that the Connecticut statute is unconstitutional because of its discrimination against persons from other States who "enter Connecticut without visible means of support for the immediate future." See Brief for Appellees in *Shapiro* v. *Thompson*, pp. 24-28.

The primary purpose of this Supplemental Brief is to summarize a single narrow theme running through all the cases—drawing the arguments together—that requires affirmance of the judgment in each.

Summary of Argument

I

These three cases challenge the Pennsylvania, Connecticut and District of Columbia laws establishing one-year-residence requirements for eligibility to receive public assistance under programs of aid to dependent children.[1] Because of this requirement each of the challenged statutes distinguishes between indigent adults—and also indigent children—whose situations are identical in every respect save prior residence. Those who satisfy the technical one-year-residence requirement are granted public assistance, while those who cannot meet the requirement are denied that essential aid. Abstractly stated, therefore, the question presented by all three cases is whether this discrimination on the basis of length of residence in a State violates the Fifth and Fourteenth Amendments.

But this abstract statement conceals the flesh, blood and heart of the true question. The facts of these cases make three points clear that frame—and limit—the constitutional issue:

---

[1] All of the named plaintiffs in the three cases, except Vera Barley, were applicants for Aid to Families with Dependent Children. Mrs. Barley was an applicant for Aid to the Permanently or Totally Disabled. The decree in the Pennsylvania case enjoins enforcement of the residence requirements in all categories of public assistance: Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently or Totally Disabled, Old Age Assistance, and General Assistance (Pa. App. 156a). The decree in the Washington, D.C. case enjoins enforcement of the requirement in all categories except Old Age Assistance (D.C. App. 89).

For convenience, we speak in the argument only of AFDC assistance.

First, the classification is in relation to the bare essentials of life, material and spiritual. Food, shelter, health, freedom from institutional confinement, and the preservation of families are at stake.

Second, those denied assistance under the length-of-residence classification have no less need for public assistance in order to obtain the bare essentials of life than those to whom assistance is available. From the standpoint of the stated purposes of public assistance laws, therefore, the two classifications are indistinguishable. Moreover, except for length of immediately prior residence, their situation is identical in every respect.

Such gross discrimination—in relation to fundamental human interests—between persons whose situation is identical in all relevant respects is alone enough to violate the Equal Protection Clause and the Due Process Clause of the Fifth Amendment, unless it bears a rational relation to some other, substantial legislative problem. The elementary character of the needs served by these assistance programs distinguishes them from other State grants. Before turning to the question of justification, however, we should point out that in the present cases a much narrower decision under the Equal Protection and Due Process Clauses will suffice.

For their third basic element is that the ground of the hostile classification is solely the exercise of a basic human liberty—freedom to leave an old and personally unsatisfactory environment in pursuit of preferred associations and opportunities for self-preservation or advancement. Freedom of geographic movement, within the Union, which is the underpinning of many rights, has long been recog-

nized as an essential aspect of personal constitutional liberty. Thus, this is not merely a case of discrimination upon capricious but otherwise neutral grounds; this classification interferes with basic constitutional rights. Discrimination upon such grounds is obviously more objectionable from a constitutional standpoint than discrimination upon grounds that are neutral but irrelevant.

Even so, we need not claim that the classification is unconstitutional *per se*. Conscientious examination of the alleged justifications for the length-of-residence classification in public assistance shows that the hostile discrimination among persons otherwise identically situated, solely on the basis of their exercise of liberty of movement, is not rationally related to any permissible State objective.

The case thus falls within the familiar principle that a classification which discriminates, without justification, against those who exercise a fundamental liberty violates the Equal Protection Clause and the Due Process Clause of the Fifth Amendment.

II

A decision invalidating the one-year-residence requirement would not involve overriding either section 402(b) of the Social Security Act, 42 U.S.C. 602(b), or an implied congressional judgment that the requirement satisfies constitutional standards.

First, section 402(b), properly understood, gives no affirmative sanction to one-year-residence requirements. It implies no congressional judgment upon their wisdom or constitutionality. The sole function of that provision is to raise a federal statutory barrier to residence require-

ments longer than one year. Section 402(b) leaves all questions concerning shorter residence requirements exactly where it found them—in the hands of the State legislatures subject to normal constitutional requirements and judicial review.

Second, section 402(b) would not be controlling even if it could be read as giving statutory authorization for a one-year-residence requirement. In that event, section 402(b), like D.C. Code, §3-203(a), would be unconstitutional for the same reasons as the State laws challenged herein. Congress has no power to abrogate or dilute the guarantees of Equal Protection and Due Process. To the extent that Congress must be taken to have expressed an implied judgment on questions of legislative fact in enacting D.C. Code, §3-203 (a), our constitutional argument necessarily challenges the rationality of those conclusions, just as it does in the case of the State legislatures. But, since D.C. Code, §3-203(a) is not national legislation, it is worth observing that no such judgment lies behind the basic provisions of the Social Security Act, including section 402(b). The history of the Social Security Act shows no legislative investigation or findings. Nor can any judgment or even a congressional estimate be presumed. Since Congress did not establish any residence requirement, it had no occasion to face up to the underlying facts and resolve the issue one way or the other, as it does when it leaves the States no choice or enacts directly operative legislation.

Consequently, the Social Security Act does not relieve the Court of the duty to reach its own judgment upon whether the discrimination worked by the one-year-residence requirement is a rational response to a substantial evil.

ARGUMENT

I.

The One-Year-Residence Requirement Violates the Equal Protection and Due Process Clauses by Discriminating, Without Justification, Between Persons Identically Situated in Relation to Fundamental Human Needs, Solely Because of the Exercise of Liberty of Geographic Migration.

A. The One-Year-Residence Requirement Works Gross Discrimination, in Relation to the Very Essentials of Life, Among Persons Whose Situation Is Otherwise Identical.

Appellants admit, as they must, that the Pennsylvania, District of Columbia, and Connecticut statutes differentiate, for the purpose of public assistance, between indigent adults—and also indigent children—who are identically situated in every respect except immediately prior length of residence within the jurisdiction.[2] Those who meet the one-year-residence requirement are granted public assistance. Those who moved into the jurisdiction within the year are denied assistance even though their situation is

[2] Both the Pennsylvania and District of Columbia statutes establish an unqualified one-year-residence requirement as a condition of eligibility for AFDC assistance. Pa. Stat. Ann. title 62, §§401, 432(6). D.C. Code, §3-203. The Connecticut statute is somewhat different because it disqualifies for one year only those residents who arrive in the State "without visible means of support for the immediate future." Conn. Gen. Stat., §17-2d. The difference seems irrelevant in terms of the argument presented in this Supplemental Brief. For the additional grounds on which the Connecticut statute can be attacked, see the brief previously filed for the Appellee in *Shapiro* v. *Thompson*, No. 9, at pp. 24-28.

otherwise indistinguishable. Abstractly stated, therefore, the question presented is whether the discrimination based upon length of residence violates the Fifth and Fourteenth Amendments.

But this abstract phraseology omits the simple human facts that establish the cruelty of the discrimination and frame the real constitutional question.

1. The classification is made in relation to the bare essentials of life, material and spiritual. Public assistance is the last resource of those unable to support themselves, unable to find family, friends or private institutions able and willing to provide support, and unable to qualify for old-age insurance, unemployment compensation or any other form of social insurance. For those who cannot satisfy the one-year-residence rule, the classification means deprivation of shelter, food, and clothing. When public assistance is withheld, the entire quality of life—sometimes even life itself—is placed in jeopardy. The present cases are no more severe than typical, but they dramatically illustrate the human consequences of the classification.

Juanita Smith had, when relief was denied, five children and was pregnant with a sixth. When she returned to her home in Pennsylvania, after living in Delaware, her father was employed and gave her financial assistance. When he was laid off, she became destitute. (Pa. App. 34a-36a.) Public assistance was granted under a misapprehension but then terminated solely because of failure to satisfy the one-year-residence requirement. (Pa. App. 37a, 74a.) A private charity could provide no more than temporary assistance. (Pa. App. 44a-46a.) At the time suit was brought, almost no family resources were available to maintain

Miss Smith and her five children. (Pa. App. 36a, 46a.) Although she "is pregnant and because of the numerous pregnancies she has developed terrible varicosities," she could not obtain the necessary medical care. (Pa. App. 49a.) Provision could be made for her five children but only by breaking up the family; the City Department of Public Welfare would place the children in child care centers overcrowded to 125 percent of capacity for periods of 90 days or two years while looking for foster homes. (Pa. App. 121a-125a.) The Director of Social Services for the Department testified (Pa. App. 123a)—

> I am saying to you that we would not in our department allow any child to go without shelter, and we would certainly take those children in, but I am saying that it is a very bad policy from the point of view of human value.

Were it not for the one-year-residence requirement, Juanita Smith and her children would have received public assistance.[8] Thus, in her case the classification operated in relation to shelter, subsistence, and the custody of her children. To children, it means the difference between overcrowded institutional upbringing—or at best a foster home—and the preservation of the family as a living unit. (Pa. App. 138a.)

---

[8] The benefits sought and denied in these cases are penurious. In Pennsylvania, for example, by its own admission the State pays approximately 70 percent of its stated minimum requirements for health and decency, and 40 percent of the typical wage earner's expenditures. Pennsylvania Department of Public Welfare, *Public Assistance Allowances Compared with the Cost of Living at a Minimum Standard of Health and Decency* 1, 6 (1967). On the national pattern, see Report of the Advisory Council on Public Welfare, *Having the Power, We Have the Duty* 16-19 (1966).

Essentially the same cruel deprivations result from the length-of-residence classification in the other cases. Minnie Harrell had three children.[4] Attempting to recover from major surgery for cancer, lack of public assistance required her to live with her brother and sister-in-law, their six, and her three children in a four-bedroom apartment. Because public assistance was withheld, she too was faced with the necessity of surrendering her children for institutional care. (D.C. App. 11-12.)

Gloria Jean Brown's three youngest children were denied assistance despite their mother's eligibility, two because they joined her in the District of Columbia some months after her arrival there and one because his mother had lived in the district for less than one year when he was born. Gloria Jean Brown was required to spend all but $11.50 of the monthly assistance payment for herself and one eligible child on rent and food stamps for the family of five. Since she could no longer obtain support from relatives, she was faced with the commitment of her infant children to Junior Village. (D.C. App. 36-39.)

Clay Mae Legrant had two children at the time of suit, and was pregnant and arthritic. Living in a one-bedroom apartment in a condemned building, dependent for support on a sister (herself on public assistance) and a niece, the children were temporarily saved from commitment to Junior Village by the intervention of private charity. (D.C. App. 45-47.)

Jose Foster and her four children were forced by lack of public assistance to continue to share the three-bedroom house occupied by her brother-in-law and sister and their

---

[4] Minnie Harrell has died since the appeal was taken.

six children. The brother-in-law's weekly income of $80–$90 was inadequate to purchase food for three adults and ten children and pay rent and utility bills. Under medical care requiring frequent visits to Temple University Hospital, Jose Foster lacked sufficient transportation money to keep many of her hospital appointments. (Pa. App. 141a-144a.)

Vivian Thompson had one son and was five months pregnant with another child when, because her mother could no longer support her, she was required to seek separate housing. A private agency was supplying aid for the duration of this litigation but she was otherwise entirely without means of supporting either her family or herself. (Conn. App. 40a, 44a.)

In the case of Vera Barley the classification on the basis of length of residence means—literally—the difference between freedom and confinement.[5] She moved to the District of Columbia in March 1941 and a month later she was committed to St. Elizabeth's Hospital for mental illness. She is now competent and doctors advise her release, but she cannot leave without public assistance because she is 67 years old and has no resources. Although she has been living in the District for 27 years and no other jurisdiction acknowledges any obligation for her welfare or subsistence, the District classifies her as a resident for less than a year because of her hospitalization. Thus, as a direct result of the length-of-residence classification, she is confined to a mental institution from which she could otherwise go free. (D.C. App. 21-22.)

---

[5] Miss Barley's claim, unlike that of the other named plaintiffs, was for Aid to Permanently or Totally Disabled, but the one-year-residence requirement is the same. For the additional grounds of attack upon the District's interpretation of the requirement in this case, see D.C. Brief for Appellees, p. 7, n. 11.

The facts illustrated by the cases of the seven women and nineteen children before the Court are repeated in the lives of others in the classes these plaintiffs represent. In light of the grim reality, it seems hardly more than sardonic irony for counsel to argue that such arbitrary classifications as that in *Carrington* v. *Rash*, 380 U.S. 89, are distinguishable on the ground that there the disqualification was "permanent" (Conn. Brief for Appellants 13) while here "there is no permanent denial of welfare. If the person can get aid from their own family or aid from some charitable group for a one-year period, that person is eligible for welfare . . . ." (Conn. Brief 5.) One cannot so easily sweep out of sight the cruel and pervasive deprivations of a year of extreme economic poverty. Often other aid is not forthcoming for the year, as these cases illustrate. As lawyers, we are accustomed to dealing with discrimination in relation to relatively sophisticated rights, such as electoral disenfranchisement, freedom of religion and other civil liberties. The classification here is in relation to something simpler and more fundamental—the means of preserving a minimal existence and a family unit free of institutional care. The withholding of that basic assistance from a disfavored class manifestly erodes all other subtler and more sophisticated constitutional liberties.

We emphasize the point because it establishes one of the three important limitations upon the issue before the Court. These cases do not challenge all residence requirements upon eligibility for any form of State benefit. The public assistance at stake, including the AFDC grants, provides only the bare essentials of family existence without which other liberties are meaningless symbols.

2. The length of one's residence within a State is utterly irrelevant to the primary purpose of public assistance laws. Their central aim is to provide aid to the "needy and distressed . . . promptly and humanely . . . in such a way . . . as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society" (Pa. Stat. Ann. title 62, §401). In the case of families with children, there is the further aim to "maintain and strengthen family life" (Social Security Act, 42 U.S.C. 601). The one-year-residence requirement defeats these purposes. As the facts of these cases demonstrate, the need for those classified as ineligible under the length-of-residence test is no less than the need of those granted assistance. The withholding of assistance is no less a blow to their self-respect, social usefulness, and family life than in the case of long term residents.

3. In all other respects, except for length of residence, the appellees' situation is also indistinguishable from that of persons who receive public assistance. The sole basis of classification is length of residence.

On the basis of these facts a number of lower courts have held that the classification plainly violates the Equal Protection Clause until it can be justified by its relation to some other permissible legislative objective. Finding none, they invalidated the length-of-residence requirement. *Green* v. *Department of Public Welfare*, 270 F. Supp. 173 (D. Del.); *Thompson* v. *Shapiro*, 270 F. Supp. 331, 336-338 (D. Conn.) appeal pending as No. 9; *Smith* v. *Reynolds*, 277 F. Supp. 65 (E.D. Pa.); appeal pending as No. 34; *Harrell* v. *Tobriner*, 279 F. Supp. 22 (D. D.C.) appeal pending as No. 33; *Robertson* v. *Ott*, —— F. Supp. ——

(D. Mass.); cf. *Ramos* v. *Health and Social Services Board*, —— F. Supp. —— (E.D. Wisc.); *Johnson* v. *Robinson*, —— F. Supp. —— (N.D. Ill.).*

There is ample support for these rulings in established constitutional principles, as we have shown in our original briefs in the individual cases. See Briefs for Appellees in *Washington* v. *Harrell*, pp. 30-40 and *Reynolds* v. *Smith*, pp. 19-33. Although a State has wide powers of classification, "it is equally true that such classification cannot be made arbitrarily." *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U.S. 150, 155. See also *McLaughlin* v. *Florida*, 379 U.S. 184, 190-191, where additional authorities are collected. "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose . . . ." *Carrington* v. *Rash*, 380 U.S. 91, 93. "[T]he ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made." *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 214. Although the principle condemning arbitrary classification was first developed in relation to regulation and taxation, later decisions demonstrate that it is equally applicable to classifications made by legislation conferring advantages and opportunities. *Commonwealth of Pennsylvania* v. *Board of Directors of City Trust*, 353 U.S. 230 (school for orphans); *Evans* v. *Newton*, 382 U.S. 296 (parks); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir.), cert. denied, 376 U.S. 938 (hospitals); *Carrington* v. *Rash*, 380 U.S. 95 (franchise); cf. *Sherbert* v. *Verner*, 374 U.S. 398 (unemployment benefits);

* Other cases in which temporary class-wide injunctions have been entered without opinion are cited in D.C. Brief for Appellees, p. 40.

see Reich, *The New Property*, 73 YALE L. J. 733, 779-782 (1964). And, as we show below, a length-of-residence classification of indigents living in a community, made for the purpose of granting or withholding the very essentials of life, is unreasonable because length of residence is not pertinent to the purposes of public assistance laws or any other permissible legislative objective. See pp. 20-38 below.

But this Court need not take such broad ground in order to affirm the judgments. The challenged classification not only relates to the fundamental essentials of life prerequisite to the enjoyment of personal liberties—food, shelter, clothing, and preservation of the family. The sole ground of the discrimination is the exercise of liberty of geographic movement, which is itself a fundamental aspect of constitutional freedom. Thus, the basis of the hostile classification in these cases is not merely irrelevant and therefore capricious; it deters or punishes the exercise of another interest long affirmatively recognized in constitutional law.

B. THE ONE-YEAR-RESIDENCE REQUIREMENT DISCRIMINATES AMONG PERSONS WHOSE SITUATION IS OTHERWISE IDENTICAL SOLELY ON THE BASIS OF THE EXERCISE OF A CONSTITUTIONALLY PROTECTED LIBERTY.

The inescapable effect of the one-year-residence requirement is to deter persons from moving into the State in order to establish a new residence with desired associations and opportunities or—where the deterrence was insufficient—to disadvantage them on account of their exercise of liberty of movement. This was the avowed purpose of the sponsors of the Connecticut statute (see Conn. Brief for Appellees, pp. 14-16), and the other States will

hardly deny that either deterrence or denial of the essentials of life is the inevitable consequence of the length-of-residence classification. In any event, the actual impact or "operative effect" is open to this Court's examination. *Reitman* v. *Mulkey*, 387 U.S. 369, 373 and cases cited. And, whether it operates as a deterrent or not, the very terms of the one-year-residence rule put its punitive consequences beyond dispute.

Liberty to move and take up a new residence in a new environment or to return to one's home after migration was a key element in our development as a free people. It was for this that men risked the Atlantic passage and undertook the westward journey. Conversely, the opportunity to seek a change in environment has, in fact, been jealously preserved.

Our constitutional law also recognizes the basic human right to geographic mobility in pursuit of preferred associations and opportunities. The kernel of one aspect of the right was expressed in Article IV of the Articles of Confederation, which guaranteed "the people of each state free ingress and regress to and from any other State." The Articles' exception for paupers and vagabonds was omitted in Article IV, Section 2, of the Constitution, which carried the basic theme a step further by declaring that "the Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." In *Corfield* v. *Coryell*, 4 Wash. C.C. 371 (Cir. Ct. E.D. Pa.) Justice Washington confined the privileges and immunities so conferred to those "which are, in their nature, fundamental" but included as fundamental the "right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pur-

suits, or otherwise." *Crandall* v. *Nevada*, 6 Wall. 35, struck down Nevada's effort to tax the movement of peoples across that bridge in the western journey, some justices relying upon the commerce clause and others on the very nature of the federal union. A prime purpose of the adoption of the privileges and immunities clause of the Fourteenth Amendment was to enable persons to move their residence where they please, within a State or to another State in the federal union "with the same rights as other citizens of that State." *Slaughterhouse Cases*, 16 Wall. 36, 80; cf. *Twining* v. *New Jersey*, 211 U.S. 78, 97. In *Edwards* v. *California*, 314 U.S. 160, the Court made it clear not only that there is constitutional freedom to move into a State in pursuit of preferred associations and opportunities, but also that the indigent have no less right of migration than the affluent. And in *United States* v. *Guest*, 383 U.S. 745 all members of the Court agreed that, regardless of the particular clause or concept to which it is traced, liberty to take up residence in whatever State one desires is an interest protected by the Constitution. We need show no more here because discrimination against the exercise of such an interest—unless justified by another objective of policy—would deny Equal Protection. See pp. 20-38 below.

The liberty of geographic movement involved in the present cases is much more than travel, although travel is involved. It is freedom to leave an old and personally unsatisfactory environment for new opportunities with a different home, different government, different economic or cultural opportunities, and different associations. In a nation founded by those who moved in search for political and religious liberty and which grew great through westward migration, it is hardly necessary to argue that change

of residence is the underpinning of other basic freedoms —personal, social, economic and political—many of which enjoy constitutional stature.

Three of the present cases illustrate the point concretely. Juanita Smith moved from Delaware to Pennsylvania to rejoin her family (*i.e.* freedom of association) (Pa. App. 36), to secure better education and job opportunities (*i.e.* personal and economic self-advancement) (Pa. App. 35-36), and to escape the vestiges of racial segregation (*i.e.* political and social equality) (Pa. App. 36). Freedom of association in the simple human sense of rejoining the family was the basic reason for the return of Gloria Jean Brown to Washington. She had been brought there as an infant, attended school there, and returned there to join her eldest child, her own father, her grandmother, her four sisters and two brothers. The two of the three minor children for whom she sues in this case had been left temporarily in Arkansas until she reestablished herself. She brought them to Washington in order to reunite the family (D.C. App. 35). Minnie Harrell, who has died since the appeal was taken, moved to Washington "so that I might be able to make a better life for myself and my children" and because "my children and I need to be together with my family very much." More specifically, she faced hospitalization and, if she moved to Washington, her children could be cared for by her brother and sister-in-law (D.C. App. 7).[1] If it be supposed that freedom of association is too pretentious a description for family relationships, we should recall that the integrity of family life "is something so funda-

[1] Quotations are from the plaintiff's Affidavit in Support of Motion for Preliminary Injunction, which is part of the original record in this Court.

mental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." Justice Harlan in *Poe* v. *Ullman*, 367 U.S. 497, 551-552.

In sum, discrimination in affording public assistance to indigents solely on the basis of length of residence seriously impinges upon the recognized constitutional liberty of moving to a new home in pursuit of preferred opportunities or associations.

It can be strongly argued that this interference with liberty of movement is enough to render the one-year-residence requirement unconstitutional. See Conn. Brief for Appellees, pp. 10-23. But here again the Court need not go so far. Nor is it necessary to determine whether the guaranty of freedom of movement to a new residence rests upon the privileges and immunities clause,[8] or is secured by the commerce clause[9] or the inherent character of the federal union,[10] or is an aspect of personal liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.[11] Decision here can be solidly rested upon the Equal Protection Clause in the case of the States and the similar guarantee against arbitrary federal discrimination under the Fifth Amendment. From this point of view, the central importance of the heavy

---

[8] *Edwards* v. *California*, 314 U.S. 160, 177, 181 (concurring opinions).

[9] *Edwards* v. *California*, 314 U.S. 160; *Crandall* v. *Nevada*, 6 Wall. 35, 49 (concurring opinions).

[10] *Crandall* v. *Nevada*, 6 Wall. 35.

[11] Chafee, *Three Human Rights in the Constitution of 1787*, 192-193 (1956), quoted by Justice Harlan in *United States* v. *Guest*, 383 U.S. 745, 769, 770.

deprivations to which the one-year-residence requirement subjects those who move into a State is that it demonstrates that the resulting classification is not merely arbitrary and capricious because it discriminates upon irrelevant grounds among those who are otherwise identically situated, in relation to the most fundamental human needs, but is itself affirmatively harmful because it impinges upon the exercise of what all agree is a constitutionally-recognized aspect of liberty. Discrimination upon such ground is obviously more objectionable than discrimination upon grounds that are neutral but irrelevant.

Even so, we need not claim that the classification is unconstitutional *per se*. In these cases, conscientious examination of the alleged justifications shows that the hostile discrimination among persons otherwise identically situated, on the basis of their exercise of liberty of movement, is not rationally related to any permissible State objective.

C. The One-Year-Residence Requirement Bears No Substantial Relation to Any Permissible State Objective.

In the original briefs and oral argument of these cases considerable attention was directed to the standard of justification required to validate the length-of-residence classification. Because the classification (1) operates in relation to the bare essentials of life necessary to the enjoyment of other personal liberties and (2) is based solely upon the exercise of a constitutionally protected freedom, we have argued that the discrimination is to be judged not by the tolerant attitude applied to economic regulation but the stricter tests for invasion of human rights. See, *e.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184, 190-192; *Loving* v. *Virgina*, 388 U.S. 1, 8; *Carrington* v. *Rash*, 380 U.S. 89,

96; *Harper* v. *Board of Elections,* 383 U.S. 663, 669-670; cf. *Griswold* v. *Connecticut,* 381 U.S. 479, 497, 501 (concurring opinions); *Bates* v. *Little Rock,* 361 U.S. 516, 525.

But while we believe that to be the proper standard, our case does not depend upon it. No more is required than that the Court be willing to look behind outmoded habits and prejudice against the poor, especially the poor in other localities, in order to ascertain whether there is any substance at all to the alleged relationship between the length-of-residence requirement and the various objectives which it is alleged to serve. For when reason is substituted for prejudice and empty assumptions, it becomes apparent that there is no rational relationship between the requirement and any permissible objective of legislative policy.

Careful judicial scrutiny of alleged relationships between an apparently invidious classification and permissible objectives of State policy has never been confined to instances of racial discrimination or special categories of cases. See, e.g., *Skinner* v. *Oklahoma,* 316 U.S. 535; *Carrington* v. *Rash,* 380 U.S. 89; *Rinaldi* v. *Yeager,* 384 U.S. 305; *Levy* v. *Louisiana,* 391 U.S. 68. Care in examining the assigned justification for the egregious discrimination involved in these cases is well warranted by its human consequences, by its relation to ancient local prejudices inconsistent with current reality, and by its impact upon a basic constitutional right. It is the more appropriate because the discrimination bears upon a class with scant influence upon the political process,[12] both because of its poverty and because many of its members come from other States.[13] But

[12] *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153, n. 4.

[13] *South Carolina State Highway Department* v. *Barnwell Brothers,* 303 U.S. 177, 184-185, n. 2.

once the Court examines the facts there is no need to apply a heavier burden of justification or for the Court to substitute a judicial opinion for political judgment upon an issue where there is room for differing views. For length-of-residence classifications in granting public assistance necessary for the bare essentials of life are seen to serve no legitimate object of State policy when judged by any rational test.

Since each item in appellants' grab bag of justification is analyzed in detail in the original briefs, we merely summarize the points essential to the argument.

1. *To discourage the poor from entering the jurisdiction*

The actual reason for the one-year-residence rule is to discourage indigent persons from moving into the State. The purpose was squarely avowed by the sponsor of the requirement in the Connecticut legislation.

> If we pass this [one year residence] Bill, the word could get around that we are not an easy state . . . . As responsible legislators we cannot . . . continue to allow unlimited migration into the State, on the basis of offering instant money and permanent income to all who can make their way [here], regardless of their ability to contribute to the economy. [Connecticut General Assembly 1965, *House of Representatives Proceedings*, Vol. 11, Part 7, pp. 194-95 (Connecticut State Library); *Appendix to Plaintiff's Pretrial Memorandum in District Court*, pp. 78-80.]

Historical materials further demonstrating the purpose are contained in our original briefs. See Conn. Brief for Appellees, p. 16; D.C. Brief for Appellees, p. 45; Pa. Brief

for Appellees, pp. 21-22. Indeed, this objective is offered as justification by the District of Columbia (Brief 9), Connecticut (Brief 9-10), and by Judge Clairie, dissenting in the Connecticut case, Conn. App. 31a-35a; 270 F. Supp. 331, 339-41.

The short answer is that deterring the immigration of indigents is not a permissible object of State policy. The point was squarely determined by *Edwards* v. *California*, 314 U.S. 160. In a concurring opinion Mr. Justice Douglas declared that—

> to allow such an exception [curtailing the right of free movement of those who are poor or destitute] to be engrafted on the rights of *national* citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government.

And Justice Jackson observed that—

> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place that it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself.

Appellants' effort to distinguish *Edwards* on the ground that the California statute raised a direct bar against movement is ineffective. The penalty was aimed at those who assisted the immigration of an indigent person and thus operated only to discourage, not to bar, the indigents themselves. In any event, the form of the deterrence is

immaterial. Keeping indigents out of a State is simply not a permissible objective of State policy and a classification keyed solely to that objective violates the Equal Protection Clause. *Truax* v. *Raich*, 239 U.S. 33, 42.[14]

2. Investment in the Community

Appellees' argument that discrimination on the basis of length of residence is justified by a policy of limiting benefits to those who have an "investment" in the community or have made some "contribution" to it, is nothing more than a fictitious restatement of the ancient notion that each local community should care for its own and paupers should either remain in their place of settlement or go without relief.

The invalidity of that concept in a modern industrial nation characterized by economic unity and personal mobility is established by *Edwards* v. *California*, 314 U.S. 426. The converse of settlement is alienage. There is no room for alienage among free citizens of the federal union.

---

[14] It may conceivably be suggested that, since *Edwards* v. *California*, *supra*, rests upon the commerce clause or the inherent nature of the national government, Congress has power to authorize the States to erect barriers to interstate migration and has exercised that power in section 402 of the Social Security Act. There are two answers: First, section 402 does not give affirmative congressional sanction for State one-year-residence requirements; it merely fails to prohibit them. See pp. 39-45 below. Second, Congress has no power arbitrarily to authorize State barriers to geographic migration without some justification other than the desire to prevent it, because such migration is an aspect of a liberty protected by the Fifth Amendment. Chafee, *Three Human Rights in the Constitution of 1787*, 192-193 (1956) quoted by Justice Harlan in *United States* v. *Guest*, 383 U.S. 745, 769, 770. A different question would be presented if either Congress or a State were to enact a carefully articulated program for dealing with the hardships of rural to urban migration or a similar problem. Here, we deal only with naked protectionism.

Words like "investment" and "contribution to the community" add only verbiage without foundation in fact. Public assistance programs are not geared to investment or contribution to the welfare of a State. They are not a form of insurance. Assistance is no less available to those who, through misfortune, have been charges upon the community throughout their lives than to those who have been normally productive. Nor is there a fragment of evidence to support the view that a year's residence has any tendency to measure relative contribution to a community. Fully 40 percent of the applicants rejected for failure to satisfy the one-year-residence requirement had had lengthy prior residence in the community that denied them assistance.[15] Their earlier contribution, before moving away, may well have equalled or exceeded the investment of persons who remained.

Perhaps the chimerical nature of the entire argument is best shown by the fact that in both the District of Columbia and Pennsylvania the one-year-residence requirement is applied to infants and other dependent children under AFDC programs even when their mother, by virtue of one year's residence, has made sufficient "contribution" to be entitled to aid. Surely, it will not be seriously suggested that the eight months old infant Shawn Brown made less "contribution" than other infants to the District of Columbia because he was born within a year of his mother's return to her home and family, or that when he becomes a year old and therefore eligible it will be because of his contribution to the community during his first year of life.

---

[15] Pa. App. 84a-85a, 129a.

3. *To deter immigration by persons seeking more liberal assistance*

The most sophisticated version of the argument that a State may adopt a tough welfare policy towards indigents in order to discourage their movement into the jurisdiction asserts as its justification the desire to keep the State's program of assistance from attracting indigents from States with a lower level of available benefits.

The rationalization inevitably evokes skepticism. The States with one-year-residence requirements apply them to all indigents, even those who come from States where the level of benefits is higher than their own. States which have entered into reciprocal aid agreements waive the one-year-residence requirements even for persons coming from States with lower levels of benefits. Indigents are disqualified under the one-year-residence requirement for reasons utterly unrelated to movement in pursuit of higher benefits. Vera M. Barley was declared ineligible because she was committed to St. Elizabeth's within a year after coming to the District; Shawn Brown because he was born within a year of his mother's return to the District, even though she was entitled to aid. None of these practices is consistent with the contention that the aim of the classification is to keep the public assistance program from serving as a magnet.

Assuming that a State, regardless of the real motive, is entitled to the benefit of any rationalization counsel can supply, the argument nevertheless fails for three independently sufficient reasons:

First, it is inconsistent with *Edwards* v. *California*, 314 U.S. 160. The power of a State to shut indigent migrants

off from any advantages of its program of public assistance is no greater than its power to deny them access to other natural, social or political advantages of moving to the new residence. If New York may not regulate low-priced Vermont milk attracted to the New York market by her price regulation (*Baldwin* v. *Seelig,* 294 U.S. 511), then surely she may not exclude from her schools children of parents attracted by her superior system of public education. Similarly, Connecticut should not be permitted to discriminate against former residents of Massachusetts attracted by her program of public assistance.

Second, there is not the slightest bit of evidence to support the assertion that migrants are attracted from one State into another by differences in the level of public assistance. The argument of the briefs filed by appellants and amici rests entirely upon assertion. They cite no factual material to sustain it. Through constant repetition, the argument has gained a measure of popular and political credence, but more than widespread prejudice against a weak and unfortunate class is required to support the rationality of a discrimination, based merely upon the exercise of a basic human liberty, which operates to withhold the bare essentials of a decent existence. This is especially true where, as here, all the available data is directly contrary to the unsupported assumption.

The studies showing that welfare applicants do not migrate in search of higher benefits are discussed in the opinions below and in our original briefs, together with the testimony of State officials. See Pa. App. 84a-85a, 94a-95a, 98a (testimony of welfare officials); *id.* at 150a-151a, 154a, 277 F. Supp. at 66, 67-68 (opinion of District Court); D.C. Brief for Appellees, 50-52, n. 70 (reports of federal and

NCR

MICROCARD EDITIONS, INC.
PUBLISHERS OF ORIGINAL AND REPRINT MATERIALS ON MICROCARDS
901 TWENTY-SIXTH STREET, N.W., WASHINGTON 7, D. C. FEDERAL 3-6393

CARD 22

State agencies, and of scholarly studies); D.C. App. 67-68, 279 F. Supp. at 29 (opinion of district court); Conn. Brief for Appellees, 8, 14-15, n. 15; Brief *Amici Curiae* of The Center on Social Welfare Policy and Law, et al. 22-30.

The evidence is dramatically confirmed by the facts of the instant cases. Juanita Smith's parents and their families are long-time residents, many of them natives, of Pennsylvania. She was born in an Army Hospital outside the State (Pa. App. 30a), but came to Pennsylvania at the age of one month, and remained until 1959 (*Id.* at 22a, 30a), when she went to Delaware with William Paynter, who is the father of her three younger children. In December, 1966, her father went to Delaware and urged the family to move to Philadelphia, offering to help them until William Paynter found work (*id.* at 34a). He paid the rent and utilities bills for several months, but Paynter was unable to find a job and returned to Delaware. When Miss Smith's father was himself laid off from work, his obligations to his own family (a wife and six children) left Miss Smith's children dependent. A month later, pregnant and sick, she sought assistance (*id.* at 34a, 36a). These facts are utterly inconsistent with any suggestion that Miss Smith went to Pennsylvania because of the lure of public assistance.[16]

[16] Despite these uncontradicted facts, stipulated by counsel (Pa. App. 22a) and found by the district court (*id.* at 137a), counsel for appellants has advised this Court that Juanita Smith first came to Pennsylvania in December 1966 (Pa. Brief 6). The inadvertent error seems characteristic of the "wishful thinking," conditioned by prejudice and hostility, which conceals the facts in this area. Compare the assertion by counsel for Connecticut that "appellee's claim of unavailability to work because of the age of her children . . . failed to satisfy the appellant" (Conn. Brief 5). It was expressly stipulated below that appellee was "unable" to work or seek work or work-training "because of her pregnancy and her responsibilities to her son" (Conn. App. 41a).

Jose Foster lived in Pennsylvania from 1953 to 1965. In 1965 (though receiving public assistance) she and her children went to South Carolina to care for her ailing grandparents. She remained there until her grandfather was hospitalized and her grandmother was taken in with another relative. She then returned to Philadelphia (Pa. App. 141-144a; Pa. Brief for Appellees, n. 5).

Minnie Harrell and her family had been living in New York where she received AFDC after her separation from her husband. When she fell seriously ill with cancer, she moved to the District of Columbia, the home of her brother and sister-in-law, because they could care for her children in the event she again required hospitalization (D.C. App. 7).

Vera Barley has been in the District of Columbia for 27 years. She is deemed ineligible for assistance only because she was hospitalized within a year of her coming back to the District in 1941, where she and her family had lived for a year-and-one-half in 1935 and 1936 (*id.* at 21).

We need not recite the history of the other plaintiffs. In each instance the facts demonstrate that they had ample personal reasons for moving without the slightest intention of obtaining more liberal public assistance in a new abode. In two instances, plaintiffs moved despite a reduction of benefits: Minnie Harrell from New York to the District of Columbia and Jose Foster from Pennsylvania to South Carolina (whence she later returned).

These concrete cases might be legally unimportant if they were only exceptions to a soundly based classification. Their significance here is that they concretely illustrate the emptiness of the invidious presupposition that

new residents applying for welfare must have come to a State attracted by its public assistance. The motivations and relationships disclosed by these records are confirmed by the general reports already mentioned, including a study introduced in evidence in the Pennsylvania litigation (and accepted by State officials and by counsel, Pa. App. 84a-85a, 129a), disclosing that 40 percent of the rejected applicants had previously lived in the State, that 60 percent had relatives there, and that 64 percent came to find work (37 percent having jobs when they came). Only 10 percent were recipients of assistance in the State from which they came. One-half of the applicants lived in Pennsylvania for six months prior to seeking assistance (Pa. App. 85a). See similar facts relating to other States in the Brief *amici* of The Center of Social Welfare Policy and Law, et al. 25-30.

We do not stress these facts for the purpose of persuading the Court to resolve in our favor a controverted issue upon which there is conflicting data. Such a choice is for the policy-making branch. Here, all the evidence—factual studies, expert opinion, and evidence of record—is on one side; on the other side is only prejudice and persistent assertion. The very purpose of the Equal Protection Clause is to resolve such conflicts on the side of reason. Something more than persistent prejudice, traceable to reluctance to support newcomers, is required to justify a classification that discriminates against the exercise of a basic human liberty, in relation to the availability of the bare essentials of existence.[17]

---

[17] The difficulty of inducing legislatures to examine the facts in the face of persistent prejudice was explained to the district court in the Pennsylvania case (Pa. App. 96a-97a):

Third, the argument that the State is seeking to prevent its funds for public assistance from being dissipated by the attraction they offer to migrants from States with a lower level of benefits would not support the one-year-residence requirement, even if it were not otherwise invalid, because the discrimination is manifestly broader and more restrictive than is required to meet the asserted evil. The supposed danger cannot possibly excuse applying a one-year-residence to those who come from States with equal

---

By Judge Kalodner:

Q. In view of the experience you have just recited to us, having been with the Department of Public Assistance a number of years, the last eight or nine years in the important office you occupy [Director of Bureau of Policies and Standards], has there been any representation made to the Legislature with reference to the elimination of the one-year-residence requirement by the Department of Public Assistance?

A. Yes, there has. We have proposed a change in the residence requirement on a number of times but the latest one is a proposal of one out of five years.

Q. Is what?

A. The person have a one year's residence out of five years.

Q. And what happened to that proposal?

A. It was turned down by the Legislature. It is being reintroduced this year, I understand.

By Judge Sheridan:

Q. Why hasn't the Department proposed the complete elimination of all residence requirements instead of coming to one of five? There must be a reason.

A. There is a lot of feeling I think about assistance to persons who haven't been residents of Pennsylvania and a fear that it will greatly increase costs, which you can't counteract by estimates.

Q. How would it increase cost? I think your testimony has been the opposite, hasn't it?

A. Yes, I know, but I am talking about the public opinion.

Q. My question is directed to the Department not the public.

A. Well, this is why the Department doesn't get its proposals enacted by the Legislature, because there is a pool of opinion that the residence requirements result in an influx of people into the Commonwealth.

or lower benefit levels. The problem if genuine, could be met in the case of migrants from States with a lower level of benefits by limiting the assistance to the levels of the States from which the migrants came. Thus, even if it be assumed *arguendo* that avoiding the attention of migrants seeking public assistance is a real and permissible objective of State policy, the flat one-year-residence rule is unconstitutional because less restrictive measures are patently sufficient to satisfy the need. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508; *NAACP* v. *Alabama*, 377 U.S. 288, 307; *Shelton* v. *Tucker*, 364 U.S. 479, 488.[18]

4. *To provide an objective test of residence*

It is common ground that a State may condition public assistance on "residence," in the sense that the beneficiary is living there with no intention of presently moving.[19]

---

[18] It is apparent that the arguments made in the text apply equally to the Connecticut statute, which is somewhat narrower in scope but even more unmistakenly aimed at discouraging or penalizing the entry of those to whom it applies. Moreover, the seeming narrowness is wholly inadequate to render the statute an apt assertion of a desire to reach those entering the State to seek assistance, even if such an aim were permissible. The Regulations are set out in Conn. App. 9a-10a, and as the facts of this case plainly show, disqualify those conceded to have entered for bona fide reasons. Specifically, the distinction between those entering with a promise of a job and those entering with a credible expectation of finding work or of being supported by relatives renders the Connecticut statute far too broad to carry out the postulated purpose.

[19] Cf. Federal Handbook of Public Assistance Administration, Pt. IV, §§3620, 3651; Pa. Public Assistance Manual, §3151.11. The HEW regulations provide a simple test of residence requiring only presence without intention of presently removing. See D.C. Brief for Appellees, p. 34, n. 41. If a State were to discriminate against any resident within this definition by requiring presence for a period as a test of residence under the judgments in these cases, the Department would presumably disapprove that plan.

The reason, in our view, is that the AFDC and other forms of assistance involved in these cases are geared to the provision of a stable home, the opportunity to live a useful life in the community, and the preservation of the family unit. Grants are for biweekly or monthly periods. The type of public assistance appropriate for one passing through a locality or intending prompt departure might well be very different.

Appellants argue that since the present forms of assistance may be confined to residents, the one-year-residence rule is justified as a workable rule of thumb for determining who is a resident. The courts below uniformly rejected the argument. See Pa. App. 153a-154a, D.C. App. 70, Conn. App. 28a.

The rulings below upon this point are plainly correct. The one-year-residence rule would be a valid test of residence only if experience showed that there was a rational relationship between the fact observed and the conclusion to be inferred—between the fact that an applicant has not been in the State a full year and the conclusion that he is not presently living there with no intention to go away. Both logic and experience belie the inference. Certainly, one who has lived in a locality less than a year can be living there presently. And, the fact that one changed residence less than a year ago is no evidence that he intends to leave his current home. (Pa. App. 85a.) Even as a rebuttable presumption the one-year-residence rule would be too arbitrary a test of current residence to withstand constitutional examination. *Tot* v. *United States*, 319 U.S. 463.

Here again, the record furnishes dramatic examples of the fallacy of appellants' assertions. Gloria Jean Brown

was brought to Washington when she was an infant. She attended school there. Later, she left her first child there with her own father and went to Ft. Smith, Arkansas, with her mother. In February 1966, when her mother moved to Oklahoma in search of employment, Gloria Jean Brown went back to Washington. She considered Washington her home. She had lived there many years. Her father, her son, her grandmother, and her four sisters and two brothers were still living there. In August 1966, having reestablished herself, she sent for the two children whom she had left temporarily in Arkansas with their grandmother. In view of her background, family ties and arrangement for her children, no one could doubt the bona fides of her residence yet she was denied assistance until February 1967 because she had not been living in the District for the twelve preceding months. Even when she was granted assistance for herself and the oldest child, the next two were ruled ineligible because they had been residents for only six months. An infant born in Washington in November 1966 was also ruled ineligible because Gloria Jean Brown had not been a resident for a year prior to its birth. Manifestly, all three minor children had enduring ties to the District of Columbia and were residents by any rational test. (D.C. App. 35-36, Affidavit of Gloria Jean Brown in Support of Motion for Temporary Injunction filed as part of the original record in this Court.)

The case of Vera M. Barley further illustrates the arbitrariness of the one-year-residence rule as a test of actual residence. She had actually lived in the District for 27 years. The rule denied her public assistance solely because she had the misfortune to suffer a mental illness that re-

quired her commitment to St. Elizabeth's Hospital before she had been a resident for a year. No other jurisdiction acknowledges a relationship to her, and she has no place outside the District in which to live. Her planned arrangements to live in the District could not be pursued because public assistance was withheld. As a result, she would have been kept indefinitely in St. Elizabeth's but for the injunction below. (D.C. App. 21-22.)

Appellants' claim that so arbitrary a classification serves administrative convenience is also implausible. There are many familiar and more accurate criteria of actual residence than the one year rule. The suggestion that individual application would be a hardship is scarcely credible against the background of the actual administration of public assistance. *In every case* in which public assistance is sought, an exhaustive individualized determination is made of each relevant aspect of an applicant's life—except (we are told) his residence. The touchstone of the verification system by which need is established is individualized inquiry of a most painstaking and searching nature. In the process of that investigation all of the facts bearing on residence can readily be brought out, and often are, whether residence is in issue or not. In light of these realities of the public assistance system, abstract references to the "complex and difficult" questions involved in determining residence (D.C. Brief for Appellants, p. 10; cf. Judge Holtzoff, dissenting at D.C. App. 81) seem rather empty. Such a "remote administrative benefit" will not justify a discriminatory classification penalizing the exercise of a basic constitutional right. *Harman* v. *Forssenius*, 380 U.S. 528, 542; *Carrington* v. *Rash*, 380 U.S. 89, 96.

5. To prevent the fraudulent receipt of benefits from two States

Pennsylvania suggests that the one-year-residence requirement provides an "insulation period" necessary to prevent one recently moving from one State to another from obtaining benefits from both (Pa. Brief for Appellants, 15). This "justification" is adequately answered in the Pennsylvania appellees' brief at pp. 29-30. See, also, *Sherbert* v. *Verner*, 374 U.S. 398, 407.

We mention the argument here only because it shows how often the simple demands of decency and rationality are answered by defamation of the poor and dependent. The general fraud problem has consistently been shown to be minimal (see HEW study cited in Pa. Brief for Appellees at 29). Although there is absolutely no showing that the particular species of fraud suggested here has ever been practiced, appellants in the Pennsylvania case wish to tell the seven women now at the bar of this Court, and the class they represent, that their compelling claims must be postponed for up to a year in order to filter out other unproved claims of an anonymous group of unknown size supposed to be prone to file duplicate applications.

6. Facilitation of Budgeting[20]

Appellants' brief and Judge Kalodner's dissenting opinion in the Pennsylvania case argue that the one-year-residence requirement eases the problem of budgeting appropriations because it eliminates the need for predicting the number of persons entitled to relief who will move into the Commonwealth during the year. (Pa. Brief for Appellants, pp. 13-14; Pa. App. 163a-165a.) The speculation is dis-

[20] See also Pa. Brief for Appellees, pp. 26-29.

approved by the testimony of the Director of the Bureau of Assistance Policies and Standards that elimination of the residence requirement would not complicate budgeting (Pa. App. 95). It also contains obvious fallacies. Many States, including Pennsylvania until 1959, use two-year-budgets; in such cases the one-year-residence requirement could not eliminate any problem of prediction. Pennsylvania, like other States, waives the residence requirement under reciprocal agreements; reciprocity does not lessen any problem of prediction. In truth, any variation in the number of persons moving into a State during the year can have no more than trifling impact upon the need for public assistance in view of other larger variables affecting the state of the national and local economy. The total number of indigents affected by the residence requirement is no more than one or two percent of the total number who receive assistance. Changes in immigration into a State of the order of 10 or 20 percent could, therefore, affect the number receiving aid by only two-tenths of one percent.

7. *Protection of the fisc*

There is even less merit to the suggestion that the length-of-residence classification can be justified as a means of limiting discretionary expenditures. The desire to save money provides no rational basis for classification. It could equally well be cited as justification for withholding payments from a political or religious minority, or from those who exercise freedom of speech, or from any other group however capriciously defined. Thus, the argument based upon protection of the fisc is nothing more than a claim that hostile discrimination is permissible in the granting of benefits.[21]

[21] See also Pa. Brief for Appellees, pp. 24-25.

That contention, as we now show, is contrary to settled constitutional principles.

D. A Classification Which, Without Justification, Penalizes Those Who Exercise Constitutional Liberties by Discriminating in the Provision of Public Assistance Violates the Equal Protection and Due Process Clauses.

It is a well settled principle that a State cannot constitutionally condition the grant of an exemption, privilege, or other benefit upon the surrender of a constitutionally protected interest. *Speiser* v. *Randall*, 357 U.S. 513, 518-519; *Sherbert* v. *Verner*, 374 U.S. 398, 403-406.[22] Although the cases cited refer to other substantive constitutional guarantees, the same principle necessarily condemns as arbitrary, capricious, and therefore a violation of Equal Protection, a classification which discriminates, without other justification, solely on the basis of the exercise of such a constitutional liberty.

This is enough to invalidate the one-year-residence requirement in the Pennsylvania and Connecticut statutes. Both impose a hostile classification among persons otherwise identically situated solely upon their exercise of the constitutionally protected liberty of moving one's residence to another State in pursuit of preferred opportunities and associations. Both impose the discrimination in relation to provision of the bare necessities of life. The classification serves only prejudice against poor migrants; it has no rational relation to any permissible objective of State

[22] Additional authorities are collected in *Sherbert* v. *Verner*, *supra*, and in D.C. Brief for Appellees, p. 55.

policy. Consequently, both statutes violate the Equal Protection Clause of the Fourteenth Amendment.

In the case of the District of Columbia, the Fifth Amendment's guaranty of Due Process bars congressional establishment of invidious classifications based upon group prejudice without reasoned justification. *Bolling* v. *Sharpe*, 347 U.S. 497; *Schneider* v. *Rusk*, 377 U.S. 163. The District of Columbia residence requirement is therefore as invalid as those of the States.

II.

Section 402(b) of the Social Security Act Is Not Controlling.

A. Section 402(b) Gives No Congressional Sanction to One-Year-Residence Requirements for Public Assistance.

Section 402(b) of the Social Security Act, 42 U.S.C. 602(b) provides:[23]

> The Administrator [now the Secretary of Health, Education and Welfare] shall approve any plan which fulfills the conditions specified in subsection (a), except that he shall not approve any plan which imposes as a condition of eligibility for aid to dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately pre-

[23] Somewhat different partial restrictions upon durational residence requirements are applicable to Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled. See 42 U.S.C. §§302(b), 1202(b), 1352(b), 1382(b).

ceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

Our attack upon the constitutionality of State one-year-residence requirements for AFDC assistance does not question the constitutionality of section 402(b), nor does that provision bear upon the constitutional argument. The central thrust of section 402(b) is to invalidate the once-common State laws limiting assistance to very long term residents. In the case of AFDC grants, Congress limited the federal statutory interdiction to plans establishing residence requirements in excess of one year. The most that can fairly be inferred with respect to shorter requirements is that Congress reached the conclusion that requiring residence for one year or less was not so objectionable that the federal statute should prohibit it. It cannot fairly be said that Congress gave affirmative approval to the one-year-residence requirement from the standpoint of either policy or constitutional law. Rather, it left the matter for other methods of resolution—to the States in the first instance but subject, like other State legislation, to constitutional review.

The legislative history proves the correctness of this interpretation. One year before the Social Security Act was enacted, 42 of the 47 States which had programs for aid to dependent children—all but five—required residence for more than the one year minimum permitted by section 402. Twenty-one States required residence for a stated period in a particular county or town. Thirteen States

required two years residence within the State; six required three years residence; one, four years; and one, five years. See Social Security Board, Social Security in America, 235-36 (1937) (published for the President's Committee on Economic Security).

There was a similar problem with respect to old age assistance. Of the 27 States with old age pension laws, eight had a 10 years-residence requirement; 16 required 15 years; two required 20 years; and Arizona required residence for 35 years. 79 Cong. Rec. 5602 (1935).

The entire purpose of section 402 was to insure that these unjust eligibility requirements would *not* be carried into State plans financed under the Social Security Act. Representative Doughton, in offering the Social Security bill on behalf of the House Ways and Means Committee, said (79 Cong. Rec. 5470 (1935)):

> These provisions are designed to liberalize the State laws. With the Federal Government bearing 50 percent of the cost, it is entirely appropriate that the States be required to modify their present long-residence requirements. These were perhaps necessary safeguards so long as the pensions were paid wholly from State funds, but they frequently cause considerable hardship and are unnecessary and unwise with 50-percent Federal support.

Both House and Senate Committee reports stated (S. Rep. No. 627, 74th Cong., 1st Sess. 35 (1935); H. Rep. No. 615, 74th Cong., 1st Sess., 24 (1935)):

> (b) Liberality of residence requirement: No residence requirement shall be imposed which results in the

denial of aid with respect to an otherwise eligible child, if the child was born in the State within the year, or has resided in the State for at least a year immediately preceding the application for aid. The State may be more lenient than this, if it wishes."[24]

Thus, Congress did not face the question whether any minimum period of residence should be required. And, since it did not face that question, Congress had no occasion to make any determination whatever as to whether a one-year-residence requirement is a proper response to problems of State concern and otherwise satisfies the requirements of the federal Constitution.

No inference of affirmative congressional sanction can be drawn from the recital that the Secretary "shall approve any plan which fulfills the conditions specified in subsection (a)." The word "shall," despite its literal generality, will not bear the weight of a conclusion disproved by the legislative history. Certainly, the language is not a command to approve a plan which is patently unconstitutional, merely because it literally satisfies the only conditions stated in subsection (a). Cf. *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir.), cert. denied 376 U.S. 938. Congress cannot be taken to have commanded the Secretary to approve a plan which is racially discriminatory or which introduces an utterly capricious classification such as conditioning eligibility upon the month of the year in which a child was born. For the same reason, the Secretary acted properly when he, in fact, disapproved State exclusion of Indians, and of mothers with

[24] See, also, 79 Cong. Rec. 9268, 9285 (1935) and materials cited D.C. Brief for Appellees, pp. 56-57, n. 77.

illegitimate children.[25] At most, section 402(b) commands the Secretary not to add to the statutory conditions established by Congress administrative requirements *of his own creation* not related to the purposes of the statute or which Congress actually rejected. Such a mandate cannot be stretched into a congressional finding and judgment that no plan which satisfies those conditions is subject to constitutional attack, or that facts exist which justify all other State restrictions. The requirements of the Due Process and Equal Protection Clauses are to be read into section 402 as certainly as if they were incorporated expressly.

In the case of residence requirements, Congress came somewhat closer to the issue before the Court when it condemned residence requirements in excess of one year, but the same distinction governs. Congress left the shorter residence requirements untouched, without congressional approval or disapproval. Consequently, it had no more

---

[25] On several significant occasions the Secretary, under the so-called "equitable treatment" doctrine, has disapproved State plans containing arbitrary eligibility restrictions not specifically interdicted by the Social Security Act. Thus, he has disapproved a State quota system which was racially discriminatory; State exclusion of Indians, or of mothers with illegitimate children, from public asistance; State denial of assistance because of an "unsuitable home," where no attempt is made to change the home environment or remove the child from it; and an arbitrary limitation on the kinds of former jobs which would qualify a family for assistance on the ground of the father's unemployment. See Note, 76 *Yale L. J.* 1222, n. 7 (1967), and references there cited. While the scope of this doctrine and the basis of the Secretary's authority to employ it are not entirely settled, it should be noted that the ruling regarding "suitable home" policies was ratified by Congress (42 U.S.C. §604(b) (1964); see Note, 76 *Yale L. J.* at 1224-25), and that regarding Indians was upheld in the single judicial decision ruling on the matter. *Arizona* v. *Ewing*, Civ. No. 2008-52 (D. D.C.), dismissal affirmed on jurisdictional grounds sub nom. *Arizona* v. *Hobby*, 221 F. 2d 498 (D.C. Cir.).

reason to express a judgment upon their constitutionality than upon any other constitutional question. The available evidence, as we have seen, rebuts the notion that Congress approved the wisdom, propriety, or constitutionality of the one-year-residence rule.

The distinction between congressional indifference and congressional sanction or approval has two important consequences in the present cases.

First, affirmance of the judgments leaves section 402 untouched. Nothing in the Social Security Act would be invalidated. Henceforth, the Secretary will withhold approval of State plans containing a one-year-residence requirement just as he would withhold approval of a plan which incorporated the separate-but-equal doctrine of *Plessy* v. *Ferguson*, acting upon the ground that section 402(a) is as much a mandate to comply with the Constitution as if its requirements were incorporated expressly. See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725.

Second, the conscious decision of Congress neither to disapprove nor to establish one-year-residence requirements carries no finding or presumption to which the Court should defer. Had Congress prescribed such a requirement for inclusion in State plans, that prescription would imply, under familiar constitutional principles,[39] that Congress had found either the federal government or the States to be facing one or more problems of some substance to which the one-year-residence requirement was an appropriate response. But when, as here, Congress expressed no opinion upon residence requirements of a year or less,

[39] *E.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 652-656.

there was no reason for it to make any judgment upon their wisdom, propriety, or constitutionality, or upon any of the underlying facts.

B. Section 402(b), Even If Read to Authorize One-Year-Residence Requirements, Would Not Control the Constitutional Issue.

If section 402(b) were to be read as affirmatively authorizing one-year-residence requirements, then it should be held unconstitutional for the same reasons as the State laws and provision of the District of Columbia Code challenged in these actions. Congress has "no power to restrict, abrogate or dilute these guarantees" of Equal Protection and Due Process (*Katzenbach* v. *Morgan*, 384 U.S. 641, 651, n. 10). Reaching that conclusion, however, would not involve any substitution of judicial judgment for a congressional finding made in the enactment of the Social Security Act upon matters of fact or questions of degree relevant to the constitutionality of the one-year-residence requirement.

In considering the Social Security Act, Congress made no determination that a one-year-residence requirement was an appropriate response to a social, economic, political, or administrative problem facing either the States or the federal government. The plain fact is that there is here no legislative finding upon the one-year-residence requirement; there was no investigation, there is no factual data or even a "congressional estimate." Even if it be assumed that Congress affirmatively authorized one-year-residence requirements, there is only "what can at most be called a legislative announcement that Congress believes a state law" to be permissible (*Katzenbach* v. *Morgan*, 384 U.S. 641, 651, 666, 669, Justice Harlan dissenting).

A mere declaration of permissibility will not support a presumption of congressional determination of any underlying legislative facts. When Congress imposes a requirement upon the States or enacts legislation directly operative upon persons subject to its jurisdiction, then it is obliged to come to grips with, and resolve, the matters of fact and question of degree determining the need for the legislation. Specifically, if Congress had prescribed a one-year-residence requirement for inclusion in State plans, that prescription might imply that Congress found either the federal government or the States to be facing one or more problems for which the one-year-residence requirement was an appropriate solution. Congress could not fairly enact such a provision without making some such determination, and a proper respect for a coordinate branch of government may require the judicial branch to assume that Congress has performed its function fairly. But when Congress, at the very most, only authorizes a State either to omit or impose the requirement, it has no need to come to grips with the underlying questions. On the contrary, since such federal legislation leaves the operative decisions to the States, Congress may also appropriately leave unresolved all questions concerning the need or justification for the legislation.

Here the issue of statutory construction discussed earlier merges with that of constitutionality, and the forced and artificial quality of the asserted problem of judicial deference to congressional findings implicit in section 402(b) is exposed. There has been no legislative determination to which the findings would be relevant. The entire discussion of the constitutionality of section 402(b) assumes the existence of congressional sanction that was never granted,

and it would be an intolerable compounding of fiction to go on to assume as well a legislative judgment justifying that sanction. The entire matter can be soundly avoided, with total fidelity to what in fact occurred, by holding that section 402 simply does not speak to the matter of residence requirements of one year or less.

D.C. Code, §3-203 is, of course, a direct congressional adoption of the one-year-residence requirement for the District of Columbia. The presumptions and standard of review are the same as in the case of the State laws; and we assert its unconstitutionality upon the same grounds. Like the State laws, however, any presumed congressional finding implicit in D.C. Code, §3-203 carries none of the added weight of basic national legislation.

Conclusion

The judgments below should be affirmed.

Respectfully submitted,

ARCHIBALD COX
Langdell Hall
Cambridge, Massachusetts 02138

HOWARD LESNICK
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

Attorneys for Appellees in Nos. 9, 33, and 34

BRIAN L. HOLLANDER
One Constitution Plaza
Hartford, Connecticut 06103

Attorney for Appellee in No. 9

PETER S. SMITH
416 5th Street, N.W.
Washington, D.C. 20001

Attorney for Appellees in No. 33

THOMAS K. GILHOOL
313 South Juniper Street
Philadelphia, Pennsylvania 19107

Attorney for Appellees in No. 34

September 1968

Certificate of Service

I hereby certify that a copy of the foregoing Supplemental Brief for Appellees on Reargument was mailed, postage prepaid, to Francis J. MacGregor, Assistant Attorney General, 99 Meadow Street, East Hartford, Connecticut, Counsel for appellant in No. 9, Richard Barton, Esq., Assistant Corporation Counsel, District Building, 14th and E Streets, N.W., Washington, D.C., Counsel for appellants in No. 33, and Edgar R. Casper, Deputy Attorney General, Department of Justice, Room 409, Finance Building, Harrisburg, Pennsylvania, Counsel for appellants in No. 34, this 3rd day of September, 1968.

PETER SMITH, Esq.
Attorney for Appellees in No. 33